

**STATE OF MICHIGAN
IN THE SUPREME COURT**

CALEB GRIFFIN,

Plaintiff-Appellant,

v

SWARTZ AMBULANCE SERVICE,

Defendant-Appellee,

and

SARAH ELIZABETH AURAND

Defendant.

Supreme Court Case No. _____

Court of Appeals

Case No. 340480

Genesee County Circuit Court

Case No. 14-103977-NI

Hon. Joseph J. Farah

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii
JUDGMENT APPEALED FROM, BASIS OF JURISDICTION, GROUNDS FOR REVIEW AND RELIEF SOUGHT.....	vi
STATEMENT OF QUESTION PRESENTED	viii
I. INTRODUCTION	1
A. The Crash and Hospitalization.....	3
B. Allegations of Plaintiff’s First Amended Complaint	7
C. Procedural History	7
III. ARGUMENT	11
A. Standard of Review	11
B. The Court of Appeals Majority Opinion Erroneously Ignored the Definition of “Treatment” Consistently Employed in Prior Unpublished Court of Appeals Decisions (and a Similar Definition Employed by Dissenting Judge Kelly) to Seek Out and Employ an Especially General Definition Unrelated to Medical Services to Interpret the Language of the Emergency <i>Medical Services</i> Act in Order to Conclude That Mere Negligent Driving and Provision of Transport Constitutes “Treatment of a Patient”	13
C. Plaintiff Seeks Swartz Ambulance Service’s Vicarious Liability Under the Michigan’s Owner’s Liability Statute Based <i>Only</i> on Its Employee Mary Shifter’s Negligent Driving and the Court of Appeals Erroneously Looked to Whether the Actions of Paramedic Greg LaPointe Constituted “Treatment,” When His Conduct Is Not at Issue.....	20
D. The Court of Appeals Majority Opinion Should Be Reversed on the Basis Set Forth in Judge Kelly’s Dissent	24
E. Preemptive Response to Defendant Swartz Ambulance Service’s Anticipated Arguments in Its Answer to This Application	25
1. Properly Viewing the Evidence in the Light Most Favorable to Plaintiff and Making All Reasonable Inferences in His Favor, There Is No Record Evidence That (or at Least a Question of Material Fact Whether) Ms. Shifter Provided “Treatment” to Caleb Griffin, and, in Any Event, This Is a Red Herring Because Liability Is Only Sought Based Upon Mary Shifter’s Negligence in Driving the Ambulance, Not For Any Other Actions She May Have Taken	25
2. Defendant’s Anticipated Argument That EMSA Provides “Broad Immunity to All Individuals Who Are Engaged in the Medical First Response Field, Even if the Individual Is Merely Driving an Ambulance,” Is Contradicted by Both the Plain Language of the Statute and Interpretive Case Law	27
3. The Fact That Mary Shifter’s Negligent Driving Caused Further Injury to Caleb Griffin as a Result the Physical Impact of Second Collision and/or the Subsequent Delay	

Caused by Having to Summon a Second Ambulance to Transport Him From the Scene of the Second Collision Does Not Establish That Mary Shifter's Earlier Negligent Driving Was Somehow Treatment.....	31
4. Defendant's Anticipated Public Policy Argument Fails Where the Pertinent Language From the EMSA Statute Is Not Ambiguous, and Under That Language and Interpretative Case Law EMSA Immunity Clearly Does Not Apply to Defendant's Employee's Negligence in Driving the Ambulance	33
IV. CONCLUSION AND RELIEF REQUESTED	34
PROOF OF SERVICE.....	35

INDEX OF AUTHORITIES

Cases

<i>Castle v Battle Creek Area Ambulance</i> , unpublished opinion per curiam of the Court of Appeals, issued March 19, 2009 (Docket No. 277068)	24, 29
<i>Caterpillar Inc v Williams</i> , 482 US 386 (1987).....	33
<i>Computer Network, Inc v AM Gen Corp</i> , 265 Mich App 309; 696 NW2d 49 (2005).....	11
<i>Corley v Detroit Bd of Educ</i> , 470 Mich 274; 681 NW2d 342 (2004).....	11, 12, 22
<i>Doe v Doe</i> , 486 Mich 851; 780 NW2d 300 (2010).....	16
<i>Doe v Doe</i> , unpublished opinion per curiam of the Court of Appeals, issued Sept 17, 2009 (Docket No. 285655)	passim
<i>Driver v Naini</i> , 490 Mich 239; 802 NW2d 311 (2011).....	33
<i>Foreman v Foreman</i> , 266 Mich App 132; 701 NW2d 167 (2005).....	13
<i>Frost v United Ambulance Service</i> , unpublished opinion per curiam of the Court of Appeals, issued July 29, 1977 (Docket No. 194723).....	19, 29
<i>Gladych v New Family Homes, Inc</i> , 468 Mich 594; 664 NW2d 705 (2003).....	14
<i>Griffin v Swartz Ambulance Service</i> , unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2018 (Docket No. 340480).....	passim
<i>Hazle v Ford Motor Co</i> , 464 Mich 456; 628 NW2d 515 (2001).....	22
<i>In re Application of Indiana Michigan Power Co</i> , 275 Mich App 369; 738 NW2d 289 (2007).....	15
<i>Ingesoulain v Lincoln Park</i> , unpublished opinion per curiam of the Court of Appeals, issued Feb 5, 2002 (Docket No. 226778)	29
<i>Jackson v Saginaw Co</i> , 458 Mich 141; 580 NW2d 870 (1998).....	11, 22

<i>Joe v Community Emergency Med Serv</i> , unpublished opinion per curiam of the Court of Appeals, issued May 26, 2016 (Docket No. 323276)	29, 30
<i>Koontz v Ameritech Services, Inc</i> , 466 Mich 304; 645 NW2d 34 (2002).....	15, 34
<i>Lee v Dowagiac Volunteer Fire Dep't Ambulance Serv</i> , unpublished opinion per curiam of the Court of Appeals, issued June 10, 2010 (Docket No. 289605)	18, 19, 24, 29
<i>Libralter Plastics, Inc v Chubb Group of Ins Companies</i> , 199 Mich App 482, 485; 502 NW2d 742 (1993).....	12
<i>Lytle v Malady</i> , 458 Mich 153; 579 NW2d 906 (1998).....	13
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999).....	12, 22
<i>Meyer v Center Line</i> , 242 Mich App 560; 619 NW2d 182 (2000).....	12
<i>Mich Ed Ass'n v Secretary of State</i> , 489 Mich 194; 801 NW2d 35 (2011).....	33
<i>Paris Meadows, LLC v City of Kentwood</i> , 287 Mich App 136; 783 NW2d 133 (2010).....	15
<i>People v Thompson</i> , 477 Mich 146; 730 NW2d 708 (2007).....	15, 18, 34
<i>Rose v Nat'l Auction Group</i> , 466 Mich 453; 646 NW2d 455 (2002).....	12
<i>Skinner v Square D Co</i> , 445 Mich 153; 516 NW2d 475 (1994).....	13, 22
<i>Skotak v Vic Tanny Int'l, Inc</i> , 203 Mich App 616; 513 NW2d 428 (1994).....	12
<i>Smith v Globe Life Ins Co</i> , 460 Mich 446; 597 NW2d 28 (1999).....	12
<i>Soffin v City of Livonia Fire & Rescue Dept</i> , unpublished opinion per curiam of the Court of Appeals, issued July 3, 2001 (Docket No. 219880).....	29
<i>Tuggle v Dep't of State Police</i> , 269 Mich App 657; 712 NW2d 750 (2005).....	34
<i>United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n</i> , 484 Mich 1; 795 NW2d 101 (2009).....	33
<i>West v Gen'l Motors Corp</i> , 469 Mich 177; 665 NW2d 468 (2003).....	12

Statutes

Emergency Medical Services Act, MCL 333.20901 et seq.	vi, viii, 2
MCL 257.401	1
MCL 333.20904	13, 28
MCL 333.20906	passim
MCL 333.20965	passim
MCL 600.215	vii
MCL 691.1405	23
MCL 8.3a	15, 18
Michigan Owner’s Liability Statute, MCL 257.401 et seq.....	1, 7, 14

Rules

MCR 2.116.....	passim
MCR 7.215.....	15
MCR 7.303.....	vii
MCR 7.305.....	vii
MRE 201	16

Other Authorities

<i>American Heritage Dictionary of the English Language</i> (5th ed., 2016).....	17
<i>Merriam-Webster’s Collegiate Dictionary</i> (11th ed.)	15, 24
<i>Oxford English Dictionary</i> (2d ed.)	19, 24
<i>Random House Webster’s College Dictionary</i> (1997).....	15, 18, 24
<i>Webster’s New World College Dictionary</i> (5th ed., 2014)	17

**JUDGMENT APPEALED FROM, BASIS OF JURISDICTION, GROUNDS FOR
REVIEW AND RELIEF SOUGHT**

Plaintiff-Appellant Caleb Griffin seeks leave to appeal the Court of Appeals' opinion in *Griffin v Swartz Ambulance Service*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2018 (Docket No. 340480) (Exh 1). The Court of Appeals affirmed the trial court's grant of summary disposition of Plaintiff's owner's liability ordinary negligence claim against Defendant-Appellee Swartz Ambulance Service, with Judge Kelly dissenting. The majority held that the Emergency Medical Services Act ("EMSA"), MCL 333.20901 et seq., which provides in pertinent part that "the acts or omissions of a medical first responder [or] emergency medical technician . . . do not impose liability in the treatment of a patient on" a "life support agency," "[u]nless the act or omission is the result of gross negligence or willful misconduct," applied to the limited, specific allegations of medical first responder and EMT Mary Shifter's negligent driving. *Griffin* (Exh 1), at *8-*9; MCL 333.20965(1). The majority located a lay dictionary with an especially general definition of "treatment" unrelated to the provision of medical services and employed it interpret the Legislature's undefined use of that term in the Emergency *Medical Services* Act. Based thereon, the majority found negligent driving, i.e., the mere provision of transport to a patient, constitutes "liability in the treatment of a patient" under EMSA. MCL 333.20965.

Judge Kelly's dissenting opinion employed a lay dictionary definition of "treatment" that pertained to the provision of medical services and was consistent with the lay dictionary definition of "treatment" that had been employed in two prior unpublished Court of Appeals decisions applying EMSA. *Griffin* (Exh 1), at *10-*11. Under this definition, Judge Kelly concluded that Ms. Shifter's negligence "in driving the ambulance through an intersection" **was not** "part of plaintiff's treatment" and because Plaintiff did not allege Swartz Ambulance Service's liability

based upon negligent treatment, it should not have been afforded the EMSA's limited immunity (such that the trial court's grant of summary disposition is properly reversed). *Id.* at *9.

Plaintiff-Appellant moved for reconsideration of the Court of Appeals opinion, which the Court denied by Order on January 22, 2019, with Judge Kelly indicating that he would grant reconsideration. (Exh 2).

This Court has jurisdiction to entertain the present Application for Leave to Appeal pursuant to MCL 600.215(3) and MCR 7.303(B)(1). The Court of Appeals majority opinion in this case is clearly erroneous and will cause material injustice to Plaintiff on the bases articulated herein. MCR 7.305(B)(5)(a). Further, the decision conflicts with another decision of the Court of Appeals. MCR 7.305(B)(5)(b). Additionally, the issues presented herein involve legal principles of major significance to the state's jurisprudence. MCR 7.305(B)(3).

Plaintiff-Appellant would have this Court peremptorily reverse the Court of Appeals decision affirming the trial court's grant of summary disposition, and remand for further proceedings. Alternatively, Plaintiff-Appellant would have this Court grant the present Application to allow full briefing and oral argument on the issues presented.

STATEMENT OF QUESTION PRESENTED

- I. Whether the Court of Appeals erred in affirming the trial court's grant of summary disposition to Defendant Swartz Ambulance Service, holding the Emergency Medical Services Act, MCL 333.20901 et seq., provides immunity to the ambulance operation which employs a medical first responder and emergency medical technician who is negligent in driving an ambulance and thereby causes injury to a patient, i.e., that liability for negligence in the mere provision of transport to a patient constitutes "liability in the treatment of a patient" under that statute. MCL 333.20965.

Plaintiff-Appellant contends the answer is: "Yes."

Defendant-Appellee contends the answer is: "No."

I. INTRODUCTION

Plaintiff Caleb Griffin was injured in a motor vehicle accident on October 7, 2012, when the vehicle in which he was a passenger rolled over. Caleb suffered a dislocated right knee in the crash. An ambulance owned by Defendant Swartz Ambulance Service (hereinafter, "Swartz") was summoned to the scene. Caleb was placed in the ambulance for transport to a hospital and evaluated. While the ambulance was being driven to a hospital by Mary Shifter (a Swartz employee, medical first responder and emergency medical technician) it struck another vehicle. Prior to the ambulance crash, Shifter provided no treatment to Caleb. Rather, paramedic Greg LaPointe evaluated, treated and rode with Caleb in the rear of the ambulance. Shifter also did not activate the ambulance's emergency lights or siren prior to the crash. The crash was severe and caused Caleb's dislocated leg to reduce (or to be slammed back into place) causing injury to the popliteal artery which runs behind the knee. Plaintiff was eventually transferred to another ambulance following the crash and taken to McLaren Hospital in Flint, Michigan. He was then transferred to the University of Michigan Medical Center by helicopter where he underwent several operations to restore blood flow to his lower leg through the injured popliteal artery. The surgeries were not successful and the injured leg was eventually amputated above the knee.

Plaintiff brought this lawsuit against Defendant Swartz Ambulance Service, alleging that it has owner's liability for the negligent manner in which its agent, medical first responder and EMT Mary Shifter, operated an ambulance it owned while transporting Plaintiff Caleb Griffin to a hospital from the scene of an automobile accident. The Michigan Owner's Liability Statute, MCL 257.401 et seq., imposes liability upon the owner of a motor vehicle if the operator of the vehicle is negligent. MCL 257.401(1). Plaintiff also brought suit against Sarah Aurand, the driver of the other vehicle with which the ambulance collided.

On November 29, 2018, the Court of Appeals affirmed the trial court's grant of summary disposition of Plaintiff's owner's liability ordinary negligence claim against Swartz Ambulance Service, with Judge Kelly dissenting. *Griffin v Swartz Ambulance Service*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2018 (Docket No. 340480) (Exh 1). The majority held that the Emergency Medical Services Act ("EMSA"), MCL 333.20901 et seq., which provides in pertinent part that "the acts or omissions of a medical first responder [or] emergency medical technician . . . do not impose liability in the treatment of a patient on" a "life support agency," "[u]nless the act or omission is the result of gross negligence or willful misconduct," applied to the limited, specific allegations of Ms. Shifter's negligent driving. *Griffin* (Exh 1), at *8-*9; MCL 333.20965(1). The majority located a lay dictionary with an especially general definition of "treatment" unrelated to the provision of medical services and employed it interpret the Legislature's undefined use of that term in the Emergency *Medical Services* Act. Based thereon, the majority found negligent driving, i.e., the mere provision of transport to a patient, constitutes "liability in the treatment of a patient" under EMSA. MCL 333.20965.

Judge Kelly's dissenting opinion employed a lay dictionary definition of "treatment" that pertained to the provision of medical services and was consistent with the lay dictionary definition of "treatment" that had been employed in two prior unpublished Court of Appeals decisions applying EMSA. *Griffin* (Exh 1), at *10-*11. Under this definition, Judge Kelly concluded that Ms. Shifter's negligence "in driving the ambulance through an intersection" **was not** "part of plaintiff's treatment" and because Plaintiff did not allege Swartz Ambulance Service's liability based upon negligent treatment, it should not have been afforded the EMSA's limited immunity (such that the trial court's grant of summary disposition is properly reversed). *Id.* at *9.

The Court of Appeals' November 29, 2018 majority opinion should be peremptorily reversed for the reasons stated in Judge Kelly's dissent and herein and this matter remanded for further proceedings. Alternatively, Plaintiff-Appellant would have this Court grant the present Application to allow full briefing and oral argument on the issues presented.

II. STATEMENT OF FACTS

A. The Crash and Hospitalization

On October 7, 2012, Caleb Griffin, a healthy, 16-year-old young man was injured when the car in which he was riding rolled over on US-23 near Grand Blanc Road in Genesee County at approximately 1:00AM. Caleb was sitting in the front passenger seat of the Explorer, which was being driven by his cousin Jamey Griffin when she fell asleep and lost control of the vehicle. During the rollover, Caleb suffered a dislocation of his right knee. (Exh 3, First Amended Complaint, ¶¶ 4, 8). Following the accident, police and an ambulance owned by Defendant Swartz responded to the scene. In light of Caleb's obvious injury he was placed on a backboard and stretcher and secured in the ambulance for transport to a hospital. (Exh 3, ¶ 8). Shortly after the ambulance left the scene, as it was exiting the freeway, it was also involved in a collision. Swartz employee, medical first responder and EMT Mary Shifter was driving the ambulance at the time of the collision. Defendant Sarah Aurand was driving a car which the ambulance struck at the US-23 exit ramp's intersection with Thompson Road. (Exh 3, ¶¶ 8, 9). The ambulance and Aurand's vehicle were both disabled in the crash. As a result of the impact, Caleb, who was secured to a stretcher, slammed against a wall of the ambulance and his dislocated knee spontaneously reduced, causing significant further injury to it. (Exh 3, ¶ 15). Shifter never activated the ambulance's emergency warning lights or siren in the "priority 2" transport of Caleb. (Exh 4, Shifter Dep, p 44, 47). A "priority 2" transport is "nice and easy to the hospital," "you're not running with the lights or sirens but you're also getting there as quickly as possible," i.e., mere driving in conformity with

the Michigan's Motor Vehicle Code, MCL 257.1, et seq. (Exh 4, Shifter Dep, p 46-47). Following the accident, another ambulance was called to the scene and Caleb was transferred into it and taken to McLaren Hospital. (Exh 3, ¶ 14).

Mary Shifter never provided any "treatment" to Caleb. She testified at her deposition that she did not assess Caleb when the Swartz Ambulance arrived at the scene of the first accident:

Q Did you see Mr. LaPointe do an assessment of Mr. Griffin when the two of you arrived on the scene?

A I believe at the time that we arrived on the scene, he did - - he would have done an assessment.

Q What did you see Mr. LaPointe doing? You said he did an assessment so you seen him touching the injured leg; is that correct?

A Yes.

Q And you saw Mr. LaPointe do an exam in which he touched the leg in order to obtain a pulse; is that correct?

A Yes.

Q And you remember Mr. LaPointe finding a pulse and recording that in the medical records or into the charts for Swartz; is that correct?

A Yes.

Q You also remember Mr. LaPointe finding during his neurological assessment that Mr. Griffin had sensations in his leg, because he charted "no neurological deficits?"

A Right.

Q Now, that examination was done after Mr. Griffin was on the gurney in the ambulance?

A Yes.

Q Did you do any assessment for Mr. Griffin?

A I myself did not. [(Exh 4, Shifter Dep, pp 35-36 (emphasis added)).]

At the scene of the first accident, Ms. Shifter did not know the type of injury Caleb had suffered:

Q I want you to tell me exactly where you were when Mr. LaPointe told Mr. Caleb Griffin he believed he should go to Hurley. Where were you when the conversation took place?

A I was in the back of the ambulance with Mr. LaPointe and Mr. Griffin.

Q Was there anyone else there with you?

A Not that I'm aware of; not that I recall.

Q Were you aware of the type of injuries Mr. Griffin had when this conversation took place?

A No, sir. [(Exh 4, p 39) (emphasis added).]

Following her ambulance's collision with Ms. Aurand's vehicle, Ms. Shifter remained with the now-disabled ambulance she had been driving, never went to the hospital and had no contact with Caleb:

Q Now, after the accident did you remain with the disabled ambulance?

A Yes, sir.

Q Another ambulance came to the scene of the accident involving the ambulance; is that correct?

A Yes.

Q That ambulance wound up taking Mr. Griffin to the hospital; is that correct?

A Correct.

Q Did you ever go to the hospital?

A No, sir. [(Exh 4, p 38).]

Greg LaPointe, the paramedic assigned to the first, Swartz ambulance, evaluated and cared for Caleb at the scene of the rollover accident and rode with him in the back of the ambulance prior to the second collision. He has testified Caleb's right leg, specifically at his foot, had a pulse and was neurologically intact when he evaluated him prior to leaving the scene of the first accident. (Exh 5, LaPointe Dep, pp 39-42).

In a December 7, 2015 Affidavit Defendant Swartz provided in support of its motion for summary disposition based on EMSA, Swartz's Vice President of Operations Jeffrey Lewis testified:

3. Caleb Griffin's transportation was categorized as "Priority 2," which means the patient, while not in a critical condition, still requires attention at a hospital.

4. In a Priority 2 transportation, paramedics administer treatment to the patient in the course of transportation, including, as in this case, checking pulses and vitals and administering pain medication when necessary.
5. Swartz dispatched an ambulance to the scene of the accident. Swartz employee Gregory LaPointe administered uninterrupted patient care to Mr. Griffin, which included: spinal immobilization by placing him on a back board with a C-collar; pillow splinting of his leg; providing advanced life support, or ALS, intervention en route, including several vital assessments of his pulse and respiratory levels and monitoring of his sinus bradycardia; treatment of his nausea and pain; administering pain medication, including Zofran and morphine; providing him with an IV; and transporting him for emergency medical care at McLaren Regional Medical Center.
6. Mary Shifter, the driver of the Swartz ambulance, was an employee of Swartz hired in December 2011. Ms. Shifter has a license from the State of Michigan as an emergency medical technician.
7. Gregory LaPointe, the paramedic of the Swartz ambulance, was an employee of Swartz hired in September 2012. Mr. LaPointe obtained a certificate of completion from McLaren Regional Medical Center as an Advanced Provider and obtained a license from the State of Michigan as a Paramedic. [(Exh 6, Jeffrey Lewis Affidavit, ¶¶ 3-7).]

Notably, Lewis' affidavit makes no mention whatsoever of Mary Shifter having provided *any* "treatment" to Mr. Griffin. She was merely "the driver of the Swartz ambulance." (Exh 6, ¶ 6).

Following Caleb's arrival at McLaren Hospital he was evaluated by Scott Horst, M.D., an emergency room doctor. McLaren records indicate Dr. Horst took a history from Caleb and LaPointe, and that he was unable to find a pulse in Caleb's lower right leg during his examination. Recognizing the serious situation, Dr. Horst eventually arranged for Caleb to be transferred to the University of Michigan Medical Center by helicopter. Injuries to the veins and arteries of the leg must be treated quickly to avoid loss of function and viability of the lower leg. (Exh 3, ¶ 14).

Caleb arrived at University of Michigan Medical Center 5:42AM. He was taken to the operating room at 6:45AM and surgery began at 7:29AM. Orthopedic and vascular surgeons operated all day on Caleb to restore blood flow to the lower leg, which had been interrupted by the injury to the popliteal artery that occurred in the Swartz ambulance collision with Ms. Aurand's

vehicle. The surgery was unsuccessful and Caleb eventually lost his lower leg to amputation after more surgeries a few days later. (Exh 3, ¶¶ 14-16).

B. Allegations of Plaintiff's First Amended Complaint

Plaintiff's First Amended Complaint alleges Defendant Swartz owned the ambulance its employee, Mary Shifter, was driving when it collided with Sarah Aurand's vehicle. (Exh 3, ¶ 6). It further alleges Ms. Shifter was negligent in the operation of the ambulance by failing to yield at the intersection of US-23 and Thompson Road. (Exh 3, ¶ 12). It further alleges that, as the owner of the ambulance, Swartz, is liable for Shifter's negligent operation under the Michigan Owner's Liability Statute, MCL 257.401 et seq. (Exh 3, ¶ 10).

The force of the ambulance crash caused Caleb's dislocated right knee to spontaneously reduce, which caused it further injury. More specifically, the resultant injury to Caleb's popliteal artery caused diminished blood flow to his lower leg and, ultimately, amputation. (Exh 3, ¶¶ 15-16).

C. Procedural History

Defendant Swartz initially filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) claiming immunity from any owner's liability for negligence based upon EMSA. (Exh 7, Def Swartz EMSA MSD (w-o exhs)). Plaintiff filed a Response. (Exh 8, Plf Resp EMSA MSD (w-o exhs)). Defendant Swartz also filed a separate motion for summary disposition claiming Plaintiff could not prove Swartz's negligence was a proximate cause of Plaintiff's injury. The Court heard oral argument on the EMSA summary disposition motion on January 11, 2016. It found the issue whether EMSA immunity applied to Plaintiff's owner's liability claim against Swartz to, in turn, be determined by whether, in an emergency situation, driving an ambulance constitutes "treatment" under that statute:

But we are where we began, that is whether or not driving in an emergency situation

where one person is working on the patient and the other is driving the ambulance, whether driving is considered treatment?” [(Exh 9, 1-11-16 Trans, pp 32-33).]

The trial court found, based upon unpublished authority, that that was, in fact, the case:

Because at this juncture - - now, compelled is a strong word. Because once again I know that . . . [the unpublished cases cited during the argument are] not binding. But I do feel impelled would be a better word to find that transportation in this scenario is treatment. [*Id.* at 37.]

During the oral argument, Plaintiff asserted that Swartz had waived EMSA immunity by failing to raise it as an affirmative defense and the trial court directed the parties to submit supplemental briefing on this issue. Plaintiff and Swartz submitted supplemental briefing. (Exhs 10 and 11, respectively). A subsequent hearing occurred on July 21, 2016 regarding both summary disposition motions. The trial court denied the motion arguing a lack of proximate cause and granted the EMSA motion, holding that the operation of the motor vehicle should be considered treatment under the statute and that Swartz was accordingly immune (absent gross negligence or willful misconduct, which was not alleged). (Exh 12, 7-18-16 Trans).

Following the hearing, counsel for Plaintiff and Swartz submitted an order granting summary disposition to Swartz based upon its EMSA argument, denying summary disposition as to its proximate cause argument, and erroneously indicating that the order resolved the last pending claim and closed the case, which the Court entered on July 21, 2016. (Exh 2, 7-21-16 Order).

On August 1, 2016, Plaintiff filed a Motion for Relief from the Order and/or Reconsideration pursuant to MCR 2.612(C) and/or MCR 2.116(F) to correct the July 21, 2016 Order’s erroneous indication that it resolved all pending claims and closed the case.¹ The trial court granted this motion and entered an Order on August 8, 2016: (1) granting summary

¹ While Plaintiff and Defendant Aurand had previously discussed dismissing Plaintiff’s claim against her without prejudice, no order dismissing Plaintiff’s claim against Aurand was ever submitted or entered.

disposition pursuant to EMSA; (2) denying summary disposition based upon there being no question of material fact as to proximate cause; and (3) stating the effective date of the Order is July 21, 2016. (Exh 14). The August 8, 2016 Order states it is not a final Order and does not dispose of all claims in the case. (Exh 14).

Plaintiff filed a timely Application for Leave to Appeal from the August 8, 2016 Order, Defendant filed an Answer, and Plaintiff filed a Reply. In a February 2, 2017 Order, the Court of Appeals denied the Application “for failure to persuade the Court of the need for immediate appellate review.”

On September 15, 2017, following the resolution of Plaintiff’s claim against Defendant Aurand, the trial court entered a Stipulated Order for Dismissal With Prejudice that was the final order and closed the case. (Exh 15).

Plaintiff took a timely appeal of right to the Court of Appeals from that final order. Plaintiff filed his Brief on Appeal, Defendant Swartz then filed its own Brief on Appeal, and Plaintiff filed a Reply.

Following oral argument, in an unpublished opinion, via split decision, the Court of Appeals affirmed the trial court’s grant of summary disposition of Plaintiff’s owner’s liability ordinary negligence claim against Defendant-Appellee Swartz Ambulance Service, with Judge Kelly dissenting. The majority held that EMSA, which provides in pertinent part that “the acts or omissions of a medical first responder [or] emergency medical technician . . . do not impose liability in the treatment of a patient on” a “life support agency,”² “[u]nless the act or omission is

² MCL 333.20906(1) defines “life support agency” to mean “an ambulance operation, non-transport prehospital life support operation, aircraft transport operation, or medical first response service.”

the result of gross negligence or willful misconduct,” applied to the limited, specific allegations of medical first responder and EMT Mary Shifter’s negligent driving. *Griffin* (Exh 1), at *8-*9; MCL 333.20965(1). The majority located a lay dictionary with an especially general definition of “treatment” unrelated to the provision of medical services and employed it interpret the Legislature’s undefined use of that term in the Emergency *Medical Services* Act. *Griffin* (Exh 1), at *7-*8. Based thereon, the majority found negligent driving, i.e., the mere provision of transport to a patient, constitutes “liability in the treatment of a patient” under EMSA:

According to Shifter and her partner, plaintiff’s hospital run was considered a “Priority 2” run, meaning they wanted to get to the hospital as quickly as possible, even though the lights and siren were not activated. In this context, the term “treatment” can reasonably be construed as including the safe and timely transportation of the patient to the hospital to receive medical care. The evidence showed that (1) Shifter was a medical first responder or EMT who was part of the defendant’s ambulance staff; defendant is a life-support agency; (2) defendant was providing emergency services to plaintiff when the collision occurred, and (3) the collision occurred while plaintiff was being transported to the hospital for prompt medical care. We conclude that under these circumstances, Shifter’s operation of the ambulance at the time of the second accident qualifies as conduct involving “the treatment of a patient” within the meaning of MCL 333.20965(1). Accordingly, the trial court did not err by granting defendant’s motion for summary disposition. [*Griffin* (Exh 1), at *8-*9.]

Judge Kelly’s dissenting opinion employed a lay dictionary definition of “treatment” that pertained to the provision of medical services and was consistent with the lay dictionary definition of “treatment” that had been consistently employed in two prior unpublished Court of Appeals decisions applying EMSA. *Griffin* (Exh 1), at *10-*11. Under this definition, Judge Kelly concluded that Ms. Shifter’s negligence “in driving the ambulance through an intersection” *was not* “part of plaintiff’s treatment” and because Plaintiff did not allege Swartz Ambulance Service’s liability based upon negligent treatment, it should not have been afforded the EMSA’s limited immunity (such that the trial court’s grant of summary disposition is properly reversed). *Id.* at *9.

Plaintiff-Appellant moved for reconsideration of the Court of Appeals opinion, Defendant Swartz filed a Response, and the Court of Appeals denied the motion by Order on January 22, 2019, with Judge Kelly indicating that he would grant reconsideration. (Exh 2).

III. ARGUMENT

A. Standard of Review

While the Defendant only cited MCR 2.116(C)(8) and (C)(10) as grounds for its motion for summary disposition claiming immunity from any owner's liability for negligence based upon EMSA, and the trial court and Court of Appeals failed to consider the motion under MCR 2.116(C)(7), Defendant plainly seeks limited immunity pursuant to EMSA and its motion is therefore properly considered thereunder. "A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition. It is well settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). Plaintiff has consistently addressed MCR 2.116(C)(7) in his response to the motion for summary disposition and on appeal.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Corley v Detroit Bd of Educ*, 470 Mich 274, 277; 681 NW2d 342 (2004).

When deciding a motion for summary disposition under MCR 2.116(C)(7), the Court must consider not only the pleadings, but also "all affidavits, pleadings, and other documentary evidence," construing them in the light most favorable to the nonmoving party. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998); MCR 2.116(G)(5). Likewise, the reviewing court must also "make all legitimate inferences in favor of the nonmoving party." *Id.*

A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery and the moving party is entitled to judgment as a matter of law. See

Rose v Nat'l Auction Group, 466 Mich 453, 461; 646 NW2d 455 (2002); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994).

A motion “under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone.” “The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery.” [*Corley*, 470 Mich at 278 (internal citation omitted).]

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Corley*, 470 Mich at 278. A party moving for summary disposition under MCR 2.116(C)(10) must specifically identify the undisputed factual issues and support its position with documentary evidence. MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) . If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 and n2; 597 NW2d 28 (1999); *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 485; 502 NW2d 742 (1993).

A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *West v Gen'l Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Michigan appellate courts are liberal in finding that a genuine issue exists. *Lytle v Malady*, 458 Mich 153, 176-177; 579 NW2d 906 (1998).

Courts “may not resolve factual disputes or determine credibility in ruling on a summary disposition motion.” *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). “[W]here the truth of a material factual assertion of a moving party is contingent upon credibility, summary disposition should not be granted.” *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

B. The Court of Appeals Majority Opinion Erroneously Ignored the Definition of “Treatment” Consistently Employed in Prior Unpublished Court of Appeals Decisions (and a Similar Definition Employed by Dissenting Judge Kelly) to Seek Out and Employ an Especially General Definition Unrelated to Medical Services to Interpret the Language of the Emergency Medical Services Act in Order to Conclude That Mere Negligent Driving and Provision of Transport Constitutes “Treatment of a Patient”

MCL 333.20965(1) provides in pertinent part:

Unless an act or omission is the result of gross negligence or willful misconduct, **the acts or omissions of a medical first responder,^[3] emergency medical technician,^[4]** emergency medical technician specialist, paramedic, medical director of a medical control authority of his or her designee, or, subject to subsection (5), an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual’s licensure or additional training required by the medical control authority including, but not limited to, services described in subsection (2), or consistent with an approved procedure for that particular education program **do not impose liability in the treatment of a patient on those individuals or any of the following persons:**

* * *

³ MCL 333.20906(8) defines “medical first responder” to mean:

. . . an individual who has met the educational requirements of a department approved medical first responder course and who is licensed to provide medical first response life support as part of a medical first response service or as a driver of an ambulance that provides basic life support services only. Medical first responder does not include a police officer solely because his or her police vehicle is equipped with an automated external defibrillator.

⁴ MCL 333.20904(7) defines “emergency medical technician” to mean: “[A]n individual who is licensed by the department to provide basic life support.”

(d) **The life support agency**^[5] or an officer, member of the staff, or other employee of the life support agency. [(Emphasis added).]

Only if the foregoing language from EMSA applies must Plaintiff demonstrate a question of material fact that Defendant Swartz's employee Mary Shifter's conduct in driving the ambulance amounted to gross negligence to proceed on his claim. Otherwise, Swartz can be found liable for Mary Shifter's ordinary negligence in driving the ambulance under the Michigan Owner's Liability Statute, MCL 257.401 et seq.

Notably, MCL 333.20965 makes no differentiation between whether the acts or omissions occur in an emergent or a non-emergent situation. *Griffin* (Exh 1), at *6-*7. In any event, here the situation was clearly non-emergent, with the ambulance being driven in a priority 2 run status, i.e., "nice and easy to the hospital" without its emergency lights or siren being activated. (Exh 4, Shifter Dep, pp 44, 46-47).

EMSA provides no express definition of "treatment," although it is defined within the context of its use in the *Emergency Medical Services Act*. In *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), the Supreme Court explained:

When interpreting statutes, our obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language. If the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written." "Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." [*Id.* at 597 (internal citations omitted).]

EMSA's plain, unambiguous language provides immunity for "treatment," not the operation of a motor vehicle. "Our fundamental obligation when interpreting statutes is 'to ascertain the

⁵ MCL 333.20906(1) defines "life support agency" to mean "an ambulance operation, non-transport prehospital life support operation, aircraft transport operation, or medical first response service."

legislative intent that may reasonably be **inferred** from the words expressed in the statute.” *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007) (quoting *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002) (emphasis added)).

Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art. We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning. This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary. [*Id.* at 151-152 (internal citations omitted).]

In this case, the Court of Appeals majority opinion articulated no basis for failing to even address, let alone employ, the materially different lay dictionary definition of “treatment” consistently employed in prior unpublished Court of Appeals decisions (and the substantially similar definition employed by dissenting Judge Kelly). “Although unpublished opinions of this Court are not binding precedent, they may, however, be considered instructive or persuasive.” *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145; 783 NW2d 133 (2010) (internal citations omitted) (citing MCR 7.215(C)(1); *In re Application of Indiana Michigan Power Co.*, 275 Mich App 369, 380; 738 NW2d 289 (2007)).

The *Griffin* majority opinion quoted the following definition of “treatment” from *Merriam-Webster’s Collegiate Dictionary* (11th ed.): “**a**: the act or manner or an instance of treating someone or something: HANDLING, USAGE <the star requires careful ~ > **b**: the techniques or actions customarily applied in a specified situation.” Notably, this definition includes the phrase: “the star requires careful [treatment],” which is an entirely different context for “treatment” than a medical first responder or EMT’s purported “treatment of a patient.”

On the other hand, in *Doe v Doe*, unpublished opinion per curiam of the Court of Appeals, issued Sept 17, 2009 (Docket No. 285655) (Exh 16), rev’d in part on other grds 486 Mich 851 (2010), the Court of Appeals noted *Random House Webster’s College Dictionary* (1997) defines

“treatment” as “the application of medicines, surgery, therapy, etc., in treating a disease or disorder.” *Doe* (Exh 16), at * 11. In *Doe*, an employee of defendant Superior Ambulance sexually assaulted a 14-year-old girl in the back of an ambulance while another employee drove the ambulance, transporting her from one hospital (where she had been treated for self-inflicted wounds related to a suicide attempt) to another hospital where she was to receive in-patient psychiatric treatment. Liability was sought based on the ambulance company and driver’s breach of their duties to protect the girl, such as by calling the police, once it became apparent that the other employee was committing sexual assault. As Defendant Swartz has done here, the *Doe* defendants argued they were in fact providing treatment to the plaintiff (e.g., by strapping her into a gurney; securing the gurney in the ambulance; giving her IV fluids; monitoring her vitals; and that the act of transporting her to a psychiatric hospital for in-patient psychiatric treatment expedited, allowed for, and was part and parcel of that subsequent treatment) and that they were therefore entitled to EMSA immunity. *Doe* (Exh 16), at *9. The *Doe* Court rejected those arguments, concluding that because “the services being provided by defendants in this matter concerned merely the provision of transport and not medical treatment,” MCL 333.20965(1) is inapplicable. *Id.* Notably, the Michigan Supreme Court thereafter left the Court of Appeals *Doe* decision intact with regard to the applicable definition of “treatment” and applicability of EMSA immunity while vacating and remanding in part on other grounds.⁶ *Doe v Doe*, 486 Mich 851; 780 NW2d 300 (2010).

⁶ The same attorney representing Swartz Ambulance Service in this case, Thomas G. Cardelli, was the attorney of record for the defendants in the *Doe* case through the trial and into the post judgment proceedings (Exh 17, *Doe* WCCC Docket Sheet), and his associate, Anthony F. Caffrey, III, who wrote the Court of Appeals briefing in this case, likewise handled the interlocutory appeal of the EMSA issue in *Doe* (Exh 18, *Doe* Appellate Docket Sheet). This Court can take judicial notice of these facts, MRE 201, and, as defense counsel’s virtually identical, overreaching EMSA immunity arguments failed in *Doe*, they should be consistently found to fail here too.

Similar to *Doe*, in this case, Plaintiff has only alleged Swartz Ambulance Service has owner's liability for its employee Mary Shifter's negligence in driving the ambulance from the scene of Plaintiff's initial collision, i.e., the mere provision of transport and not medical treatment. By no stretch of the imagination can driving the ambulance be considered "the application of medicines, surgery, therapy, etc., in treating a disease or disorder" as described by the *Doe* Court. This is especially the case where, as here, the ambulance is being driven in a priority 2 run status, i.e., "nice and easy to the hospital" without its emergency lights or siren being activated. (Exh 4, Shifter Dep, pp 44, 46-47). Damningly, the Court of Appeals majority decision reaches the opposite conclusion from *Doe* on virtually identical facts (where the negligent conduct has nothing to do with medical treatment or "treatment of a patient"), without even addressing or attempting to distinguish it and the definition of "treatment" *Doe* employed.

"[T]he application of medicines, surgery, therapy, etc., in treating a disease or disorder" necessitates direct "hands on" application of a service or touching or actual manipulation of a patient and not something as indirect as driving a motor vehicle. *Webster's New World College Dictionary* (5th ed., 2014), defines "et cetera" to mean "1. and others; and the like; and the rest; and so forth. 2. or the like; or others of the same kind; or something similar." Likewise, the *American Heritage Dictionary of the English Language* (5th ed., 2016), defines "et cetera" to mean "And other unspecified things of the same class; and so forth." There is nothing similar between driving or operating a motor vehicle and applying medicines, conducting surgery or providing therapy such that it does not constitute "treatment" and come within the immunity provided by MCL 333.20965(1). EMSA obviously intended to provide protection for EMTs providing direct medical care, not for something so far removed as the manner in which they drive an ambulance as an ordinary motor vehicle without its lights and sirens activated.

When “ascertain[ing] the legislative intent that may reasonably be inferred from the words expressed in the statute” and considering the “plain and ordinary meaning” of the language of MCL 333.20965(1), there is no need, nor are courts permitted, to stretch or expand the meaning of the word “treatment.” *Thompson*, 477 Mich at 151; MCL 8.3a. Had the Legislature wished to provide immunity to a person merely driving an ambulance as an ordinary motor vehicle without its lights and sirens activated, it could easily have inserted plain language providing such inclusion. It did not, and medical first responder and EMT Mary Shifter’s conduct in negligently driving the Swartz ambulance does not constitute “treatment.”⁷

As in *Doe*, in *Lee v Dowagiac Volunteer Fire Dep’t Ambulance Serv*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2010 (Docket No. 289605) (Exh 19), the Court of Appeals **again** employed the *Random House Webster’s College Dictionary* (1997) definition of “treatment” to be that term’s “ordinary meaning” for purposes of interpreting and applying EMSA. *Lee* (Exh 19), at *2-*4. While Defendant has relied on *Lee* because it found EMSA applicable, it is factually distinguished. The *Lee* Court found “the incident falls within the treatment of the plaintiff, where the emergency providers were called to plaintiff’s home, assessed his situation and administered medical treatment to him at his residence, decided he should go to the hospital, moved him to an ambulance and continued to provide care en route to the hospital.” *Lee* (Exh 19), at *3. The Court accordingly found “[t]his is not a case of merely transporting a patient from one

⁷ While Defendant Brief on Appeal to the Court of Appeals misrepresented *Doe*’s definition of “treatment” by claiming “if ‘treatment’ is limited to just providing medicine, surgery, and therapy, then there is very little that any first responder would ever do that qualifies as treatment.” (Def’s Brief on Appeal to COA, pp 22, 25). This argument is an artificial constriction of the definition of “treatment” (and therefore the statutory language) and ignores the plain language of the definition (and therefore the statute) by ignoring that the definition of “treatment” employs the term “etc.” The statutory language is what it is and Michigan’s rules of statutory construction dictate that it be applied as such.

location to another,” and additionally emphasized the record evidence that the defendant paramedic provided “treatment for plaintiff at the scene and en route to the hospital in this emergency situation.” *Lee* (Exh 19) at *3-*4. In contrast to *Lee*, here Plaintiff seeks to hold Swartz liable under the Michigan Owner’s Liability Statute solely for medical first responder and EMT Mary Shifter’s negligence in driving an ambulance (while its light and siren were not activated), i.e., merely for operating a motor vehicle and providing transport, and there is no evidence that Mary Shifter provided “treatment” to Caleb Griffin at any point in her contact him.

Further still, in Judge Kelly’s dissent in this case, he cited to the definition of “treatment” from the *Oxford English Dictionary* (2d ed.): “[m]anagement in the application of remedies; medical or surgical application or service.” This definition is substantially similar to the definition from *Random House Webster’s College Dictionary* (1997) employed in both *Doe* and *Lee* and properly relates to the provision of medical services in light of the fact that the term is employed in the Emergency *Medical Services Act*.

Similarly, in *Frost v United Ambulance Service*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 1977 (Docket No. 194723) (Exh 20), the Court of Appeals found EMSA immunity inapplicable to “the straightforward task of maneuvering a person in a wheelchair” because it has nothing to do with “providing services to a patient outside a hospital . . . that are consistent with the individual’s licensure or additional training required by the local medical authority” as stated in MCL 333.20965(1)). *Frost* (Exh 20), at *1-*2. Likewise, the straightforward task of merely driving a motor vehicle “neither require[s] licensure or additional training nor call[s] upon such specialized knowledge, such activities do not fall within the ambit of the immunity provided by the statute.” *Frost* (Exh 20), at *2-*3.

In light of the foregoing, it was totally unreasonable for the majority opinion to seek out and employ a lay dictionary definition of “treatment” that was: (1) especially general and unrelated to the provision of medical services, even though it was employed in the context of the Emergency *Medical Services* Act; and (2) materially different from the lay dictionary definition employed by prior panels of the Court of Appeals (and the substantially similar definition employed by Judge Kelly).

C. Plaintiff Seeks Swartz Ambulance Service’s Vicarious Liability Under the Michigan’s Owner’s Liability Statute Based *Only* on Its Employee Mary Shifter’s Negligent Driving and the Court of Appeals Erroneously Looked to Whether the Actions of Paramedic Greg LaPointe Constituted “Treatment,” When His Conduct Is Not at Issue

Under the pertinent plain and express language of MCL 333.20965(1), “liability in the treatment of a patient” is only imposed on a “life support agency,”⁸ where the act or omission in question is the result of the gross negligence or willful misconduct of “*a* medical first responder, emergency medical technician,” etc. (Emphasis added). Plaintiff *only* seeks to hold Defendant Swartz vicariously liable for medical first responder and EMT Mary Shifter’s negligence in driving the ambulance pursuant to Michigan’s Owner’s Liability statute. (Exh 3, First Amended Complaint). Despite this, the Court of Appeals majority opinion improperly cites to and relies on purported evidence that a paramedic was purportedly providing emergency services in the back of the ambulance when the collision occurred as grounds on which to find “Shifter’s operation of the ambulance at the time of the second accident qualifies as conduct involving ‘the treatment of a patient’ within the meaning of MCL 333.20965(1).” *Griffin* (Exh 1), at *9. More specifically, the majority opinion claims: “The evidence showed that (1) Shifter was a medical first responder or EMT who was part of the defendant’s ambulance staff; defendant is a life-support agency; (2)

⁸ Including “an ambulance operation” such as Swartz Ambulance Service. MCL 333.20906(1).

defendant was providing emergency services to plaintiff when the collision occurred, and (3) the collision occurred while plaintiff was being transported to the hospital for prompt medical care.” *Griffin* (Exh 1), at *9-*10. Under EMSA, and, particularly, the language of MCL 333.20965(1), whether Mary Shifter was a member of Defendant’s purported “ambulance staff” and whether another Swartz employee may have been providing emergency services to Plaintiff in the back of the ambulance at the time of the collision has absolutely no bearing on whether Swartz is vicariously liable under Michigan’s Owner’s Liability statute for Shifter’s negligent driving. Under MCL 333.20965(1), one looks to the conduct of “a” medical first responder, emergency medical technician or paramedic, i.e, an individual and not the conduct of an ambulance staff. Further, Plaintiff’s claim against Defendant Swartz Ambulance Service under Michigan’s Owner’s Liability statute based on Mary Shifter’s negligent driving has nothing to do with the conduct of paramedic Greg LaPointe in the back of the ambulance. Rather, it is expressly limited to whether Mary Shifter’s conduct in merely driving the ambulance at a motor vehicle without its lights and siren activated was negligent, and only whether this conduct constitutes “treatment of a patient” is properly considered for purposes of determining whether EMSA immunity is applicable.

The Court of Appeals majority opinion further provides:

Plaintiff was being transported from an accident site to a hospital to receive immediate medical treatment for an injury. According to Shifter and her partner, plaintiff’s hospital run was considered a “Priority 2” run, meaning they wanted to get to the hospital as quickly as possible, even though the lights and siren were not activated. In this context, the term “treatment” can reasonably be construed as including the safe and timely transportation of the patient to the hospital to receive medical care. [*Griffin* (Exh 1), at *9.]

Contrary to the applicable de novo standard of review of a trial court's MCR 2.116(C)(7) (immunity granted by law)⁹ and MCR 2.116(C)(10) (no genuine issue as to any material fact) summary disposition decision,¹⁰ the foregoing quote demonstrates that the majority opinion improperly fails to view the direct and circumstantial evidence in the light most favorable to the non-movant and to make all reasonable inferences from such direct and circumstantial evidence (viewed in that manner) in the light most favorable to the non-movant.¹¹ Mary Shifter testified at her deposition that she was driving the ambulance in a "priority 2" run status at the time of the collision, which she describes as "*nice and easy to the hospital*" where "you're not running with the lights or sirens but you're also getting there as quickly as possible." (Exh 4, Shifter Dep, pp 44, 46-47). Without lights and sirens activated, Ms. Shifter in driving the ambulance was obliged to follow the constraints of the Michigan's Motor Vehicle Code, including speed limits.¹² See, e.g., MCL 257.632. In other words, Mary Shifter was *merely driving* the ambulance to its destination and was not providing any "treatment" to Caleb Griffin when her negligent driving

⁹ Again, while the Defendant only cited MCR 2.116(C)(8) and (C)(10) as grounds for its motion, and the trial court and this Court failed to consider it under MCR 2.116(C)(7), Defendant plainly seeks limited immunity pursuant to EMSA and its motion is therefore properly considered thereunder.

¹⁰ *Corley*, 470 Mich at 277 (holding a trial court's decision on a motion for summary disposition is reviewed de novo on appeal).

¹¹ In deciding an MCR 2.116(C)(7) or (C)(10) motion, the Court must consider "all affidavits, pleadings, and other documentary evidence," construing them in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; *Jackson*, 458 Mich at 142; MCR 2.116(G)(5). The reviewing court must also "make all legitimate inferences in favor of the nonmoving party." *Skinner*, 445 Mich at 161, 166; *Jackson*, 458 Mich at 142. Circumstantial evidence can be evaluated and utilized in regard to determining whether a genuine issue of material fact exists for purposes of summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 465, n10; 628 NW2d 515 (2001); *Skinner*, 445 Mich at 166-167.

¹² (Although, in light of the Court of Appeals majority opinion finding mere driving of an ambulance to be "treatment of a patient," apparently EMSA would separately allow an ambulance driver to drive the ambulance without regard to the Motor Vehicle Code without lights and sirens activated so long as such violations do not constitute gross negligence or willful misconduct).

caused Plaintiff's injury as any ordinary person would understand that word, yet the majority would find such negligent driving constitutes "the treatment of a patient" under the EMSA. (Exh 4, Mary Shifter Dep Excerpts, pp 44, 46-47). The actions of the paramedic in the back of the ambulance was irrelevant to the alleged negligence of the driver, Mary Shifter.

Under the Court of Appeals majority's definition and ruling, mere driving of an ambulance as a motor vehicle without its lights and siren activated constitutes "treatment of a patient" and EMSA astoundingly affords more immunity to private ambulance company than a governmental entity pursuant to MCL 691.1405, which provides in pertinent part that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner"

Is anyone driving a person experiencing a medical emergency to a hospital (for example, someone driving their spouse who is in a labor) engaged in "treatment" or "in the treatment of a patient"? Of course not, and for the definition of "treatment" under EMSA to be so broad as for this to be the result defies common sense and common understanding of the term "treatment" or the phrase "treatment of a patient." As Judge Kelly's dissent noted, Ms. Shifter's negligence "in driving the ambulance through an intersection" **was not** "part of plaintiff's treatment." *Griffin* (Exh 1), at *9. Had the Legislature intended mere negligent driving to come within EMSA's limited immunity, they would not have employed the term "treatment" or the phrase "treatment of a patient." The Legislature could easily have inserted plain language providing such inclusion. It did not. The majority's departure from prior unpublished decisions of this Court defining "treatment" and applying EMSA without providing any discussion or reason therefore to reach its

counterintuitive result creates inconsistency and uncertainty in the law and suggests improper legislation from the bench.

D. The Court of Appeals Majority Opinion Should Be Reversed on the Basis Set Forth in Judge Kelly's Dissent

Judge Kelly's dissent looked to the *Oxford English Dictionary* (2d ed.) definition of "treatment" in interpreting the undefined use of that word in EMSA. That dictionary provides that "treatment" consists of "[m]anagement in the application of remedies; medical or surgical application or service." *Griffin* (Exh 1), at *10-*11. This definition, as compared to the one from the *Merriam-Webster's Collegiate Dictionary* (11th ed.) the majority sought out, is largely the same as and consistent with the *Random House Webster's College Dictionary* (1997) definition that has been previously employed in *Doe* and *Lee* with regard to what constitutes "treatment of a patient," under the EMSA.¹³ Applying this definition to the specifically-alleged negligent driving of Mary Shifter, i.e., the actual conduct on which Plaintiff seeks to hold Swartz Ambulance Service liable under the Michigan Owner's Liability Statute, Judge Kelly concluded :

. . . the record reflects that at the time of the motor-vehicle accident the ambulance driver was not undertaking any action to manage plaintiff's injuries. Rather, she was merely transporting him to the hospital while the paramedic in the patient-compartment of the ambulance provided treatment. Accordingly, because no negligent treatment is alleged, . . . no immunity is afforded to defendant under MCL 333.20965(1).

The reasoning in Judge Kelly's dissent is sound and should be relied upon as the basis for peremptory reversal of the Court of Appeals majority opinion affirming the trial court's grant of summary disposition.

¹³ And what constitutes "liability" under MCL 333.29065(1) in EMSA in *Castle v Battle Creek Area Ambulance*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2009 (Docket No. 277068) (Exh 21).

E. Preemptive Response to Defendant Swartz Ambulance Service's Anticipated Arguments in Its Answer to This Application

1. *Properly Viewing the Evidence in the Light Most Favorable to Plaintiff and Making All Reasonable Inferences in His Favor, There Is No Record Evidence That (or at Least a Question of Material Fact Whether) Ms. Shifter Provided "Treatment" to Caleb Griffin, and, in Any Event, This Is a Red Herring Because Liability Is Only Sought Based Upon Mary Shifter's Negligence in Driving the Ambulance, Not For Any Other Actions She May Have Taken*

In its Answer to this Application, Defendant Swartz is expected to once again argue, as it did in its Answer to Plaintiff's Application for Leave to Appeal and its Brief on Appeal to the Court of Appeals, that Mary Shifter did more than merely drive the ambulance, such as assisting the paramedic, Greg LaPointe, in assessing and securing Mr. Griffin in the ambulance, which actions are immunized under EMSA. On the contrary, properly viewing the evidence in the light most favorable to the non-movant Plaintiff and making all reasonable inferences in the non-movant Plaintiff's favor there is no viable evidence that Ms. Shifter provided "treatment" to Caleb Griffin. At the very least there is a question of fact on this point. Further, this is a red herring because liability is only sought for Ms. Shifter's negligence in driving the ambulance, and not for any other actions she may have taken with regard to Mr. Griffin (for which Defendant has provided no evidence).

Defendant has previously misrepresented the testimony of Mr. LaPointe and Ms. Shifter in a failed effort to conjure up evidence that Ms. Shifter somehow provided "treatment" to Plaintiff Caleb Griffin. For example, Defendant's Answer to Plaintiff's Application for Leave to Appeal and its Brief on Appeal to the Court of Appeals claimed LaPointe testified that Ms. Shifter assisted in placing Griffin on a backboard with a C-Collar. (Def's Brief on Appeal to COA, p 5). However, the page from LaPointe's deposition Defendant cited in support of this claim only provides:

Q. You said you placed him on a backboard with a C-collar?

A. Correct.

Q. Were you assisted by anyone in doing that?

A. *I would imagine* my partner. [(Exh 5, p 35) (emphasis added).]

Defendant's Answer and Brief on Appeal to the Court of Appeals also noted that LaPointe employed the pronoun "we" a couple of times in his deposition testimony, and claimed that this somehow established that Ms. Shifter likewise provided Caleb Griffin with treatment. (Def's Brief on Appeal to COA, p 5). It does not.

Q. After you had the man, Mr. Griffin, on the backboard with the C-collar and a pillow-splinted extremity, what did you do?

A. Did a detailed assessment. Obviously, as we are assessing this patient while we are back-boarding, there's things that are involved. Prior to putting someone on a backboard, you touch and feel their back for any injuries, and talk to them as you do it for pain in any way, shape, or form. [(Exh 5, pp 37-38).]

This self-serving, ambiguous testimony contradicts Ms. Shifter's clear testimony that she did not do any assessment of Mr. Griffin. (Exh 4, pp 35-36).

Q. What did you do to secure him to the stretcher?

A. I believe the -- first off, the backboard would have had him secured upper, middle, lower; three straps. I don't recall if we crisscrossed or if we just went directly above; it was just depending on per patient. But he was secured times three in some fashion onto that backboard.

* * *

Q. Okay. But you do remember using the third strap, the lower strap?

A. According to my records, we secured times three. So, yes. [(Exh 5, pp 48-49).]

This self-serving, ambiguous testimony (if this Court ignores the standard of review and fails to properly view it in the light most favorable to the Plaintiff and with all reasonable inferences in Plaintiff's favor) at most evidences that Ms. Shifter essentially put a seatbelt on Mr. Griffin for the ambulance ride, which is not "treatment."

Finally, Defendant's Answer and Brief on Appeal to the Court of Appeals asserted Ms. Shifter described herself "more broadly than as a mere driver, but as an EMT and 'helper' to LaPointe." (Def's Brief on Appeal to COA, p 5). However, the page from Shifter's deposition Defendant's Answer cited in support only indicates that she "stood by and watched [Mr.

LaPointe's] assessments" and that she does not recall doing anything. (Exh 4, p 36). Defendant's Answer and Brief on Appeal to the Court of Appeals also claimed Ms. Shifter "would not have even started transporting Plaintiff to the hospital unless she herself had been satisfied that Plaintiff was secured in the stretcher." (Def's Brief on Appeal to COA, p 5). However, the page from Shifter's deposition Defendant cites in support indicates Ms. Shifter did not recall whether Mr. Griffin was secured to the stretcher with two or three straps, that she just stood there and watched, and that she "only know[s] that" "[h]e would have been secured to the stretcher . . . [and t]he stretcher would have been locked into the floor." (Exh 4, p 37).

The factual presentation in Defendant's Answer and Brief on Appeal to the Court of Appeals was both anemic and deceiving. Plaintiff expects more of the same in Defendant Answer to this Application. Mr. LaPointe "imagining" that Ms. Shifter helped assess Mr. Griffin or using "we" to describe securing Mr. Griffin for the ambulance ride, and Ms. Shifter's testimony that she stood around and watched Mr. LaPointe, is not evidence that she provided medical treatment to Mr. Griffin. Further, this is not even the negligent conduct for which Plaintiff seeks to hold Defendant liable. Defendant's Answer's manufactured "facts" are a red herring because liability is only sought for Mary Shifter's negligence in driving the ambulance, i.e., the mere provision of transportation, not for other actions she may have taken with regard to Mr. Griffin (for which Defendant lacks evidentiary support and regarding which there is a question of material fact).

2. *Defendant's Anticipated Argument That EMSA Provides "Broad Immunity to All Individuals Who Are Engaged in the Medical First Response Field, Even if the Individual Is Merely Driving an Ambulance," Is Contradicted by Both the Plain Language of the Statute and Interpretive Case Law*

In its Answer to this Application, Defendant Swartz is expected to once again argue, as it did in its Answer to Plaintiff's Application for Leave to Appeal and its Brief on Appeal to the Court of Appeals, that EMSA provides "broad immunity for all aspects of emergency care,

including what Plaintiff tries to characterize as mere transportation duties.” (Def’s Brief on Appeal to COA, p 12). However, this argument is contradicted by both the plain language of the statute and interpretive case law.

Mary Shifter, the employee whose negligent driving forms the basis for Defendant Swartz’s vicarious liability, is an “emergency medical technician,” with EMSA defines as “an individual who is licensed by the department to provide basic life support.” MCL 333.20904(7). She is likewise a “medical first responder,” MCL 333.20965(1), which EMSA defines as:

[A]n individual who has met the educational requirements of a department approved medical first responder course and who is licensed to provide medical first response life support as part of a medical first response service or as a driver of an ambulance that provides basic life support services only. [(Def’s Brief, p 12); MCL 333.20906(8) (emphasis added).]

Defendant has previously argued this definition somehow establishes that, in drafting EMSA, the Legislature intended to immunize a medical first responder who “is merely driving an ambulance.” (Def’s Brief on Appeal to COA, p 12). This attenuated argument ignores the plain language of the EMSA statute defining the conduct immunized from liability. In pertinent part, MCL 333.20965(1) provides:

Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder [or] emergency medical technician . . . do not impose liability ***in the treatment of a patient*** on those individuals or any of the following persons: . . . (d) The life support agency [(Emphasis added).]

Defendant has argued “[i]t would be absurd and illogical for the Legislature to expressly recognize that a driver of an ambulance is a first responder, but then exclude that first responder from the immunity protections afforded first responders.” (Def’s Brief on Appeal to COA, p 13). This argument is obviously flawed. As EMSA’s definition makes clear, not every “driver of an ambulance” is a “medical first responder.” MCL 333.20906(8). Further, MCL 333.20965(1) makes

clear that the acts or omissions of a medical first responder who is “a driver of an ambulance” are *only* entitled to EMSA immunity if they constitute “the treatment of a patient.” As the definition of “treatment,” and other authority and analysis throughout this Application make clear, merely driving an ambulance while transporting a patient in the rear of the ambulance is not “treatment” under the EMSA statute. For example, *Frost* (Exh 20) found EMSA immunity inapplicable to “the straightforward task of maneuvering a person in a wheelchair” because it has nothing to do with “providing services to a patient outside a hospital . . . that are consistent with the individual’s licensure or additional training required by the local medical authority” as stated in MCL 333.20965(1)). *Frost* (Exh 20), at *1-*2. This is also the case with merely driving a motor vehicle, which likewise “neither require[s] licensure or additional training nor call[s] upon such specialized knowledge, such activities do not fall within the ambit of the immunity provided by the statute.” *Frost* (Exh 20), at *2-*3.

In addition to Defendant’s failed efforts to distinguish *Doe* (Exh 16) and improper reliance on the factually distinguished *Lee* (Exh 19) decision already discussed, *supra*, Defendant’s Answer and Brief on Appeal to the Court of Appeals misplaced reliance on *Castle v Battle Creek Area Ambulance*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2009 (Docket No. 277068) (Exh 21), *Joe v Community Emergency Med Serv*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2016 (Docket No. 323276) (Exh 22), *Soffin v City of Livonia Fire & Rescue Dept*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2001 (Docket No. 219880) (Exh 23), and *Ingesouliau v Lincoln Park*, unpublished opinion per curiam of the Court of Appeals, issued Feb 5, 2002 (Docket No. 226778) (Exh 24). (Def’s Brief on Appeal to COA, pp 13-18).

Castle addressed defendants’ decisions with regard to continuing transport or re-routing to

a different hospital when the heart rate of plaintiff's decedent, who was sedated, paralyzed and respirator dependent, began to go down and then flat-lined, apparently because his tracheostomy tube dislodged. *Castle* (Exh 21), at *2-*3. This clearly concerned plaintiff's decedent's medical treatment and not a defendant's negligence in driving an ambulance.

Defendant's Answer and Brief on Appeal to the Court of Appeals cited *Joe* for its conclusory statement in a footnote that "[i]n order to seek liability against emergency medical providers, plaintiff must allege that the providers engaged in grossly negligent or willful misconduct." *Joe* (Exh 22), at *8, n2 (citing MCL 333.20965(1)). This overbroad *dictum* ignores the language of MCL 333.20965(1) plainly establishing that EMSA immunity only applies to the "acts or omissions" of an emergency medical technician (among others) "in the *treatment* of a patient." MCL 333.20965(1) (emphasis added).

Soffin is likewise inapplicable. It observed: "The parties do not dispute that EMSA applies to all defendants in this matter." *Soffin* (Exh 23), at *13. Accordingly, contrary to Defendant's false representation,¹⁴ the Court of Appeals ***did not*** consider or determine the issue on appeal in this case: whether plaintiff sought to impose liability for alleged grossly negligent "acts or omissions" of the EMTs and/or paramedics "in the treatment of a patient." MCL 333.20965(1). Rather, it ***only*** considered whether there was a question of material fact whether those the conduct of those EMTs and/or paramedics amounted to willful misconduct and/or gross negligence. *Soffin* (Exh 23), at *13-*18.

Unlike this case, in *Ingesoulion*, Plaintiff conceded application of EMSA and alleged the defendant EMTs were grossly negligent and violated the applicable standard of care when they treated Ingesoulion, such that it has no apparent application to the present case. *Ingesoulion* (Exh

¹⁴ (Def's Brief on Appeal to COA, p 16).

24), at *2. The EMTs may have been told Ingesoulion hit his head, but not that he had been unconscious. *Id.* at *3. He was uncooperative, only permitted a superficial examination of his person and adamantly refuse to be transported to the hospital and insisted upon going into his house. *Id.* at *3-*4. The *Ingesoulion* Court found the EMTs may have been negligent in “failing to insist upon a more complete physical examination or transportation to the hospital” but that this did not create a question of fact as to gross negligence. *Id.* at *4. The *Ingesoulion* Court **did not** consider or determine that the EMTs’ failure to transport Ingesoulion to the hospital in the context of that case constituted “an act or omission . . . in the treatment of a patient.” MCL 333.20965(1).

3. *The Fact That Mary Shifter’s Negligent Driving Caused Further Injury to Caleb Griffin as a Result the Physical Impact of Second Collision and/or the Subsequent Delay Caused by Having to Summon a Second Ambulance to Transport Him From the Scene of the Second Collision Does Not Establish That Mary Shifter’s Earlier Negligent Driving Was Somehow Treatment*

Paragraphs 14-15 of the First Amended Complaint provide:

14. As a direct and proximate result of the breach of Defendants' duties, the collision which occurred resulted in a delay in Caleb Griffin arriving at the hospital which delayed treatment of his injuries because it was necessary for another ambulance to come to the scene of the accident to transport Caleb. The delay in treating Plaintiff was significant and a proximate cause of harm because injuries to the veins and arteries of the leg must be treated quickly to avoid loss of function and viability of the lower leg.

15. As a direct and proximate cause of the negligence of Defendants the force of the crash was so severe it resulted in the reduction of Plaintiffs dislocated knee/leg and further caused injury to or exacerbation of injury to the veins and or arteries in Plaintiffs lower leg resulting in compromising blood flow to the lower extremity or further compromising the blood flow to the lower extremity. [(Exh 3).]

Defendant’s Brief on Appeal to the Court of Appeals repeatedly, misleadingly cited Paragraph 14 (Def’s Brief on Appeal to COA, pp 5, 14-15, 18-19), claiming its allegations somehow establishes that Mary Shifter’s negligent driving of the ambulance as a mere motor vehicle without its lights and sirens activated was “treatment,” because:

[W]hile the ambulance could provide *some* treatment in the back, Plaintiff alleges that getting Plaintiff to the hospital for further care was necessary to avoid the amputation. If delay means delayed care in the context of an emergency patient, as time is an important factor, then the transportation must be part and parcel with the treatment. And this is all the more true where the transportation aspects are being supplemented by hands-on medical care by another medical responder in the back of the ambulance. [(Def's Brief, p 18 (emphasis original)).]

Defendant conflates the delay caused by Mary Shifter's negligent driving with some sort of element of Plaintiff's treatment. This is nonsense. Mary Shifter's negligent driving, resulting in further injury and/or delay in Plaintiff receiving treatment at the hospital due to the resultant second collision that rendered Shifter's ambulance undrivable, involves no discretionary act or decision-making so as to even arguably meet the definition of "treatment." If the ambulance sustained a flat tire or suffered a mechanical breakdown in the course of its run, the resultant delay would of course not constitute treatment, yet the facts of this case are not materially different.

Mary Shifter's mere provision of transport to Mr. Griffin by driving the ambulance prior to the second collision was not, in fact "treatment," as that term is defined. MCL 333.20965 makes no differentiation between whether the conduct occurs in an emergent or a non-emergent situation and, in any event, prior to the second collision, Mary Shifter was driving the ambulance in a priority 2 run status, i.e., "nice and easy to the hospital" without its emergency lights or siren being activated. (Exh 4, Shifter Dep, pp 44, 46-47).

The First Amended Complaint alleges that Defendant Swartz's employee Mary Shifter, by way of her negligent conduct in driving the ambulance (and not in providing "treatment" to Plaintiff) collided with Sarah Aurand's vehicle, which caused Plaintiff's previously dislocated knee to reduce and caused or exacerbated injury to the veins and/or arteries in Plaintiff's lower leg. (Exh 3, ¶¶ 14-15). Further, Shifter's negligence and the resulting collision disabled the ambulance so that it could not transport Plaintiff to the hospital, necessitating another ambulance to come to the scene of the collision and transport him to the hospital for the medical treatment he required. *Id.* at ¶ 14. The

resultant delay in obtaining treatment for Plaintiff at the hospital due to having to summon a second ambulance was a direct and proximate cause of injury and damages to Plaintiff. *Id.* Nowhere in these allegations does Plaintiff allege negligence in the provision of “treatment” to trigger application of EMSA. Plaintiff is the master of his complaint,¹⁵ and Defendant’s attempt to replead and reconfigure Plaintiff’s First Amended Complaint is not permitted.

4. *Defendant’s Anticipated Public Policy Argument Fails Where the Pertinent Language From the EMSA Statute Is Not Ambiguous, and Under That Language and Interpretative Case Law EMSA Immunity Clearly Does Not Apply to Defendant’s Employee’s Negligence in Driving the Ambulance*

In its Answer to this Application, Defendant Swartz is expected to once again make a public policy argument, as it did in its Answer to Plaintiff’s Application for Leave to Appeal and its Brief on Appeal to the Court of Appeals. (Def’s Brief on Appeal to COA, pp 27-30). However, such argument is not properly entertained in the face of clear, unambiguous statutory language.

The pertinent language of the EMSA statute is not ambiguous. *Doe* (Exh 16), at *9-*11. According to Michigan’s well-established rules of statutory construction, courts are not to look to purported legislative intent to rewrite a statute’s plain language as Defendant is expected to argue. The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). “When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted.” *Id.* at 247. “Courts may not speculate regarding legislative intent beyond the words expressed in a statute.” *Mich Ed Ass’n v Secretary of State*, 489 Mich 194, 217; 801 NW2d 35 (2011). The plain meaning of a statute’s words provide the most reliable evidence of the Legislature’s intent. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass’n*, 484 Mich 1, 13; 795 NW2d 101 (2009). “Our fundamental obligation when interpreting

¹⁵ *Caterpillar Inc v Williams*, 482 US 386, 392 (1987).

statutes is ‘to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.’” *Thompson*, 477 Mich at 151 (quoting *Koontz*, 466 Mich at 312). “Unless defined in the statute, every word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.” *Tuggle v Dep’t of State Police*, 269 Mich App 657, 663; 712 NW2d 750 (2005).

IV. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the reasons stated in Judge Kelly’s dissent and herein, the Court of Appeals’ November 29, 2018 majority opinion should be peremptorily reversed for the reasons stated in Judge Kelly’s dissent and herein and this matter remanded for further proceedings. Alternatively, Plaintiff-Appellant would have this Court grant the present Application to allow full briefing and oral argument on the issues presented.

Respectfully submitted,

Giroux Amburn PC

Dated: March 4, 2019

/s/ Matthew D. Klakulak

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**STATE OF MICHIGAN
IN THE SUPREME COURT**

CALEB GRIFFIN,

Plaintiff-Appellant,

v

SWARTZ AMBULANCE SERVICE,

Defendant-Appellee,

and

SARAH ELIZABETH AURAND

Defendant.

Supreme Court Case No. _____

Court of Appeals

Case No. 340480

Genesee County Circuit Court

Case No. 14-103977-NI

Hon. Joseph J. Farah

PROOF OF SERVICE

Matthew D. Klakulak, being first duly sworn, deposes and states that he is not a party to the above-entitled action and that on the 4th day of March, 2019, copies of Defendant-Appellant's Application for Leave to Appeal and this Proof of Service were served upon:

Anthony Caffrey III, Esq.
Cardelli Lanfear P.C.
322 West Lincoln
Royal Oak, MI 48067

via this Court's e-filing system. He further deposes and states a copy of a Notice of Filing of Plaintiff-Appellant's Application for Leave to Appeal and this proof of service was served upon each of the following:

Clerk of the Michigan Court of Appeals
Cadillac Place
3020 W. Grand Blvd., Suite 14-300
Detroit, MI 48202-6020

Clerk of the Genesee County Circuit Court
900 S. Saginaw St.
Flint, MI 48502

The circuit court was likewise provided with the \$25 appeal fee required by MCR 7.319(C)(1) and was served via first-class mail. The Court of Appeals was served via its e-filing system.

/s/ Matthew D. Klakulak

Matthew D. Klakulak